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7 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON8 ELMER L. O'CONNELL, )  
9 Petitioner, ) No. CV-08-123-CI  
10 v. ) REPORT AND RECOMMENDATION  
11 JEFF UTTECH, ) TO GRANT RESPONDENT'S  
12 Respondent. ) MOTION TO DISMISS ALL  
13 ) CLAIMS WITH PREJUDICE14 BEFORE THE COURT on Report and Recommendation is Respondent's  
15 Answer and Memorandum of Authorities, which the court construes as  
16 a Motion to Dismiss under Rule 8, RULES GOVERNING § 2244 CASES.<sup>1</sup> (Ct.  
17 Rec. 12, 18.) Petitioner, who is proceeding pro se, is currently  
18 imprisoned at the Washington State Penitentiary in Walla Walla,  
19 Washington; Assistant Attorney General Ronda D. Larson represents  
20 Respondent. The parties have not consented to proceed before a  
21 magistrate judge.22 **FACTS**23 Petitioner is in the custody of the Washington State Department  
24 of Corrections under a 2001 jury conviction for first degree robbery  
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1 Also before the court is Petitioner's "Traverse Evidentiary  
27 Hearing Requested" which the court construes as a Reply. (Ct. Rec.  
28 15.)

1 and attempt to elude a police vehicle, committed on April 21, 2001.  
2 (Ct Rec. 13, Exhibit 1.)<sup>2</sup> The trial court (Spokane County Superior  
3 Court Judge Maryann Moreno) sentenced Petitioner to life without  
4 possibility of release under the State's habitual offender statute.  
5 (Exhibit 17.) Attorney Richard Fasy represented Petitioner  
6 throughout his trial.

The facts were summarized by the state court of appeals:

Late one night in April 2001, Mr. O'Connell assaulted a woman acquaintance, pushed her out of her car, and drove off in her car with her purse. Relevant to these facts, he was later arrested and charged with first degree robbery and attempt to elude.<sup>1</sup> RCW 9A.56.190; RCW 46.61.024.

At trial, defense counsel argued that Mr. O'Connell did not have the ability to form the intent to commit first degree robbery on the night of the incident because he had been very intoxicated and had been abusing methamphetamine and crack cocaine for several days. The victim testified that Mr. O'Connell had appeared very agitated that night and made frequent, prolonged trips to the bathroom (suggesting drug use), but she did not think he appeared intoxicated. The defense offered the testimony of Dr. Scott Mabee, a psychologist, who stated that Mr. O'Connell was likely intoxicated at the time of the incident, due to his high level of drug dependency and his low level of mental functioning. Noting that Mr. O'Connell reported daily drug use for the past three years, Dr. Mabee opined that Mr. O'Connell had diminished mental processes due to substance intoxication.

The jury found Mr. O'Connell guilty as charged. He was sentenced for these convictions as well as for the second degree robbery and related eluding convictions from another trial. See note 1. Because first degree robbery is a most serious offense (former RCW 9.94A.030(25)(a); former RCW 9A.56.200), and because he had been convicted on two previous occasions of most serious offenses, the trial court imposed a life sentence without possibility of early release.

<sup>2</sup> References to Exhibits in the State Court Record (Ct. Rec. 18) are cited to as "Exhibit \_\_\_\_." The record is available in paper format at the U.S. District Court Clerk's Office.

1                   Mr. O'Connell appealed his judgment and sentence to  
 2 this court, which reversed the counts for second degree  
 3 robbery and the related charge of eluding. *State v.*  
*O'Connell*, noted at 116 Wn. App. 1010 (2003). In June  
 4 2003, the sentencing court mistakenly resentenced Mr.  
 5 O'Connell using an offender score that included the  
 6 eluding conviction that was related to the dismissed  
 7 second degree robbery conviction. On November 5, 2004, he  
 8 was resentenced to life without the possibility of  
 9 release. He filed an appeal of this judgment and sentence  
 10 three days later. His personal restraint petition was  
 11 filed on July 5, 2006.

12                   <sup>1</sup>Mr. O'Connell was charged in the same  
 13 information with four additional counts related  
 14 to an earlier purse snatching and a later  
 15 robbery. A separate trial was held on the  
 16 purse snatching counts, and a jury found him  
 17 guilty of second degree robbery and eluding.  
 18 The remaining two counts were dismissed. This  
 19 court reversed the second degree robbery and  
 20 related eluding convictions in *State v.*  
*O'Connell*, noted at 116 Wn. App. 1010 (2003).

21 (Exhibit 3 at 2-4.)

#### 22                   **PROCEDURAL HISTORY**

23                   Petitioner, through appellate counsel, timely appealed his  
 24 amended judgment and sentence to the Washington State Court of  
 25 Appeals (Court of Appeals). (Exhibit 4.) Petitioner also filed a  
 26 pro se Statement of Additional Grounds in support of his direct  
 27 appeal. (Exhibit 6.) While the direct appeal was pending, he filed  
 28 a pro se personal restraint petition (PRP) with the Court of  
 Appeals, which consolidated the direct appeal and the PRP. Both  
 were denied in a published opinion. (Exhibit 3.) Thereafter, he  
 petitioned the Washington State Supreme Court for discretionary  
 review. (Exhibit 11.) Review was denied and the Court of Appeals  
 issued its mandate on February 28, 2008. (Exhibit 13.) Petitioner  
 filed this federal Petition for Writ of Habeas Corpus on April 14,  
 2008. (Ct. Rec. 1, 5.)

**FEDERAL HABEAS CLAIMS**

Petitioner seeks federal habeas relief on grounds that he received ineffective assistance of counsel due to counsel's (a) failure to request a lesser included offense instruction regarding the robbery count; (b) failure to request a lesser included offense instruction regarding the attempt to elude count; (c) request for a voluntary intoxication instruction not supported by the evidence; and (d) failure to interview and call defense witnesses. (Ct. Rec. 2 at 5.) Petitioner also claims the cumulative effect of these errors deprived him of a fair trial. (Ct. Rec. 2 at 32.)

**EXHAUSTION OF STATE REMEDIES**

Petitioner exhausted his claims in state court within the meaning of 28 U.S.C. § 2254(b).

**EVIDENTIARY HEARING**

Petitioner argues an evidentiary hearing is required on all of his federal habeas claims. (Ct. Rec. 2, 15.) State court findings are presumed correct in federal habeas proceedings. 28 U.S.C. § 2254 (e)(1). If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court may not hold an evidentiary hearing on the claim unless the applicant shows:

(A) the claim relies on:

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

1 28 U.S.C. § 2254(e)(2). A hearing is not required if the claim  
 2 presents a purely legal question, or if the claim may be resolved by  
 3 reference to the state court record. *Campbell v. Wood*, 18 F.3d 662,  
 4 667 (9<sup>th</sup> Cir. 1994), *cert. denied*, 511 U.S. 1119 (1994). Petitioner's  
 5 PRP in the state court record and his Reply include exhibits in  
 6 support of his claims. (Exhibit 8, Ct. Rec. 15.) The state record  
 7 is adequate to review Petitioner's allegations of ineffectiveness of  
 8 counsel and cumulative error. Accordingly, Petitioner is not  
 9 entitled to an evidentiary hearing in federal court. *Baja v.*  
 10 *Ducharme*, 187 F.3d 1075, 1077-78 (9<sup>th</sup> Cir. 1999), *cert. denied*, 528  
 11 U.S. 1079 (2000).

12 **STANDARD OF REVIEW**

13 Pursuant to the Antiterrorism and Effective Death Penalty Act  
 14 of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA), federal habeas  
 15 relief from a state court judgment will be granted when a petitioner  
 16 demonstrates the state court's adjudication of the claim on its  
 17 merits "resulted in a decision that was contrary to, or involved an  
 18 unreasonable application of, clearly established Federal law, as  
 19 determined by the Supreme Court of the United States," 28 U.S.C. §  
 20 2254(d); in other words, if it applied a legal rule which  
 21 contradicts a prior United States Supreme Court holding. *Ramdass v.*  
 22 *Angelone*, 530 U.S. 156, 165 (2000) (*citing Williams v. Taylor*, 529  
 23 U.S. 362 (2000)). Relief is also appropriate "if, under clearly  
 24 established federal law, a state court has been unreasonable in  
 25 applying the governing legal principle to the facts of the case."  
 26 *Id.*

27 In *Williams*, 529 U.S. at 379, the Court announced the "clearly  
 28 established federal law" standard of § 2254(d)(1) is the equivalent

1 of the "old rule" standard under *Teague v. Lane*:

2       In *Teague v. Lane*, 489 U.S. 288 (1989), we held that  
 3 the petitioner was not entitled to federal habeas relief  
 4 because he was relying on a rule of federal law that had  
 5 not been announced until after his state conviction became  
 6 final. The anti-retroactivity rule recognized in *Teague*,  
 7 which prohibits reliance on "new rules," is the functional  
 8 equivalent of a statutory provision commanding exclusive  
 9 reliance on "clearly established law." Because there is  
 10 no reason to believe that Congress intended to require  
 11 federal courts to ask both whether a rule sought on habeas  
 12 is "new" under *Teague* - which remains the law -- and also  
 13 whether it is "clearly established" under AEDPA, it seems  
 14 safe to assume that Congress had congruent concepts in  
 15 mind. It is perfectly clear that AEDPA codifies *Teague* to  
 16 the extent that *Teague* requires federal habeas courts to  
 17 deny relief that is contingent upon a rule of law not  
 18 clearly established at the time the state conviction  
 19 became final.

20 The Court further observed a rule is "old" or, in other words, a law  
 21 is clearly established under *Teague*, if it was "dictated by  
 22 precedent existing at the time the defendant's conviction became  
 23 final." *Williams*, 529 U.S. at 381 (citing *Teague*, 489 U.S. at 301).  
 24 In contrast, a rule that "breaks new ground or imposes a new  
 25 obligation on the States or the Federal Government," is a "new  
 26 rule," and in this context, would not be a "clearly established"  
 27 law. *Williams* confirmed the principle that "apart from the Supreme  
 28 Court, federal habeas courts ought not act as innovators in the  
 field of criminal procedure, thereby upsetting state convictions  
 because state courts were not prescient and thus failed to comply  
 with federal law that did not exist at the time they ruled."  
*O'Brien v. Dubois*, 145 F.3d 16, 23 (1<sup>st</sup> Cir. 1998) (overruled on  
 other grounds by *McCambridge v. Hall*, 303 F.3d 24 (1<sup>st</sup> Cir. 2002)).  
 Thus, under § 2254(d)(1), the threshold question for a reviewing  
 court is whether the rule of law a petitioner seeks to apply "was  
 clearly established at the time his state court conviction became

1 final." *Williams*, 529 U.S. at 390. If the rule of law was clearly  
 2 established, then the court next determines whether the state  
 3 court's decision was either "contrary to or involved an unreasonable  
 4 application of" that rule of law. *Id.* at 391; *see also Baker v.*  
 5 *City of Blaine*, 221 F.3d 1108, 1110 n.2 (9<sup>th</sup> Cir. 2000) (addressing  
 6 unreasonable application prong).

7 The Supreme Court has held the clauses "contrary to" and  
 8 "unreasonable application of" have independent meaning. *Penry v.*  
 9 *Johnson*, 532 U.S. 782, 792 (2001); *Williams*, 529 U.S. at 404.  
 10 Therefore, the first prong under § 2254(d) requires a two-step  
 11 analysis.

12 Under the "contrary to" clause, a state court's decision must  
 13 be "substantially different from the relevant precedent" of the  
 14 Supreme Court before a federal habeas court can grant relief.  
 15 *Williams*, 529 U.S. at 405. A state court decision will be contrary  
 16 to clearly established Supreme Court precedent if the state court  
 17 applies a rule of law that contradicts the established Supreme Court  
 18 rule, or fails to arrive at the same result as clearly established  
 19 Supreme Court precedent in a case with materially identical facts.  
 20 *Id.* The "unreasonable application" prong is determined, not by  
 21 reference to a "reasonable jurist" standard, but by analyzing the  
 22 question of whether the application was "objectively unreasonable"  
 23 (as opposed to an incorrect or erroneous application). *Id.* at 409.

24 The role of circuit law in the federal habeas review process is  
 25 limited. A federal district court may use similar cases from the  
 26 Ninth Circuit and other circuits to help determine whether Supreme  
 27 Court law on a particular subject is "clearly established" and  
 28 whether a state court decision is within the scope of "reasonable"

1 applications of Supreme Court law, but a federal district court  
 2 cannot overturn a state court decision on habeas review because of  
 3 a conflict with circuit law. *Van Tran v. Lindsey*, 212 F.3d 1143,  
 4 1154 (9th Cir. 2000), cert. denied, 531 U.S. 944 (2000), (overruled  
 5 on other grounds by *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Duhame*  
 6 *v. Ducharme*, 200 F.3d 597, 600-01 (9<sup>th</sup> Cir. 1999).

7 State courts are not required to cite Supreme Court law or even  
 8 be aware of an applicable Supreme Court case, so long as neither the  
 9 reasoning nor the result of the state court decision contradicts  
 10 that law. *Early v. Packer*, 537 U.S. 3, 8 (2003). The last reasoned  
 11 decision of the state court is the opinion which is reviewed. *Ylst*  
 12 *v. Nunnemaker*, 501 U.S. 797, 803-04 (1991).

13 **CLAIM ONE: INEFFECTIVE ASSISTANCE OF COUNSEL**

14 Plaintiff asserts his counsel was ineffective at trial,  
 15 specifying four factual bases for this claim: (1) trial counsel did  
 16 not request a lesser included offense jury instruction for the  
 17 robbery charge; (2) trial counsel did not request a lesser included  
 18 offense jury instruction for the attempt to elude charge; (3) trial  
 19 counsel erroneously requested a voluntary intoxication jury  
 20 instruction that was not supported by the evidence; and (4) trial  
 21 counsel failed to interview and call defense witnesses who would  
 22 have corroborated the defense theory of diminished capacity. (Ct.  
 23 Rec. 1, 5.)

24 In addressing the ineffective assistance of counsel issue, the  
 25 Court of Appeals stated the following:

26 In his personal restraint petition, Mr. O'Connell  
 27 contends he had ineffective assistance of trial counsel.  
 28 He argues that defense counsel (1) failed to investigate,  
 interview, or call witnesses crucial to his defense; (2)  
 requested an instruction on voluntary intoxication that

1 was not supported by the evidence; and (3) failed to  
 2 request lesser included instructions.

3 Because effective assistance of counsel in criminal  
 4 proceedings is guaranteed by the sixth amendment of the  
 5 United States Constitution and article I, section 22 of  
 6 the Washington State Constitution, Mr. O'Connell raises a  
 7 constitutional challenge in his collateral attack. *In re*  
*Pers. Restraint of Davis*, 152 Wn.2d 647, 671-72 (2004).  
 8 Accordingly, he must demonstrate by a preponderance of the  
 9 evidence that he was actually and substantially prejudiced  
 10 by the error. *Id.* To prove ineffective assistance of  
 11 counsel, he must first show that defense counsel's  
 12 representation fell below an objective standard of  
 13 reasonableness. *Id.* at 672. Second, he must show that  
 14 his deficient representation actually prejudiced him. *Id.*  
 15 at 672-73. Failure to establish either one of these tests  
 16 defeats his claim. *Id.* at 673. Judicial scrutiny of  
 17 counsel's performance is highly deferential because there  
 18 is a strong presumption of effectiveness. *Id.* at 721.

19 (Exhibit 3, 9-10.) (Parallel citations omitted.)

20 The question, under the standard of the AEDPA, is whether the  
 21 state court's analysis of the ineffective assistance of counsel  
 22 claims was contrary to or an unreasonable application of established  
 23 law as determined by the Supreme Court law. 28 U.S.C. § 2254(d)(1).  
 24 The standard for effective assistance of counsel as enunciated in  
 25 *Strickland v. Washington*, 466 U.S. 668 (1984), is "clearly  
 26 established" Supreme Court law. *Williams*, 529 U.S. at 391. In  
 27 *Strickland*, the Court held that to prove a claim of ineffective  
 28 assistance of counsel, a petitioner must show that (1) defense  
 1 counsel's representation fell below an objective standard of  
 2 reasonableness based on consideration of all the circumstances, and  
 3 (2) defense counsel's deficient representation prejudiced the  
 4 defendant, "i.e., there is a reasonable probability that, except for  
 5 counsel's unprofessional errors, the result of the proceeding would  
 6 have been different." *Strickland*, 466 U.S. at 694. A counsel's  
 7 deficient performance must be so serious "that counsel was not

1 functioning as the 'counsel' guaranteed the defendant by the Sixth  
 2 Amendment," and so serious as "to deprive the defendant of a fair  
 3 trial, a trial whose result is reliable." *Id.* at 687. In assessing  
 4 Petitioner's ineffective assistance claim, the court need not assess  
 5 counsel's performance before examining the prejudice suffered. *Id.*  
 6 at 697. If the ineffectiveness claim can be addressed due to lack  
 7 of sufficient prejudice, "that course should be followed." *Id.*

8       Claims of ineffective assistance of counsel are mixed questions  
 9 of law and fact. *See Dubria v. Smith*, 224 F.3d 995, 1000 (2000).  
 10 If this court determines error has occurred, the harmless error  
 11 analysis under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), need  
 12 not be conducted, because "[t]he *Strickland* prejudice analysis is  
 13 complete in itself; there is no place for an additional harmless  
 14 error review." *Jackson v. Calderon*, 211 F.3d 1148, 1154 n.2 (9th  
 15 Cir. 2000), cert. denied., 531 U.S. 1072 (2001).

16       In this case, the Court of Appeals relied on *In re Pers.*  
 17 *Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004), as the legal  
 18 standard in its analysis for determining ineffective assistance of  
 19 counsel. (Ex. 3 at 10, 12, 17.) In *Davis*, the Washington State  
 20 Supreme Court thoroughly discussed the constitutional right to  
 21 effective assistance of counsel and applied the two-prong test  
 22 announced in *Strickland*. *Davis*, 152 Wn.2d at 672-73 (quoting  
 23 *Strickland*, 466 U.S. at 694). There is no dispute the state court  
 24 relied on the *Strickland v. Washington* standard as applied *In re*  
 25 *Davis*, in its determinations regarding Petitioner's claim of  
 26 ineffective assistance of counsel. For purposes of § 2254(d)(1),  
 27 the state court applied clearly established Supreme Court precedent.  
 28 *See Early*, 537 U.S. at 8.

1    **A. Factual Predicate One and Two**

2       Petitioner first contends his trial counsel was ineffective  
 3 because he did not request jury instructions for first degree theft  
 4 as a lesser included offense of first degree robbery and a jury  
 5 instruction for reckless driving as a lesser included offense of  
 6 attempting to elude a police vehicle. (Ct. Rec. 2 at 2.)

7       The Court of Appeals applied established state law in its  
 8 analysis of the lesser included offense instructions and found the  
 9 evidence did not support either lesser offense. The appellate court  
 10 analyzed the issue as follows:

11      Finally Mr. O'Connell contends trial counsel unreasonably  
 12 failed to request instructions on lesser included  
 13 offenses. It is true that a defendant has a right to have  
 14 lesser included offenses presented to the jury. RCW  
 15 10.61.006; *State v. Stevens*, 158 Wn.2d 304, 310 (2006).  
 16 A lesser included offense instruction is justified if (1)  
 17 all the elements of the lesser offense are necessary  
 18 elements of the charged offense (the legal prong), and (2)  
 19 the evidence supports an inference that the lesser crime  
 20 was committed (the factual prong). *Stevens*, 158 Wn.2d at  
 21 310. To prove ineffective assistance of counsel, Mr.  
 22 O'Connell must show that trial counsel unreasonably and  
 23 prejudicially pursued an "all or nothing" defense against  
 24 the charged crimes rather than propose lesser included  
 25 instructions. Compare *State v. Ward*, 125 Wn. App. 243,  
 26 250 (2004) (all or noting defense unreasonable when it  
 27 exposes the defendant to an unreasonable risk that the  
 28 jury will convict on the only option presented) with *State v. Hoffman*, 116 Wn.2d 51, 112-13 (1991) (foregoing a  
 lesser included offense instruction may be a legitimate  
 trial strategy).

29      Mr. O'Connell argues that defense counsel should have  
 30 proposed an instruction on first degree theft as a lesser  
 31 included offense of first degree robbery. First degree  
 32 theft is defined as wrongfully taking property or services  
 33 from the person of another with intent to deprive him or  
 34 her of such property or services. RCW 9A.56.020(1)(a),  
 35 .030. A person commits first degree robbery when he or  
 36 she "unlawfully takes personal property from the person of  
 37 another or in his presence against his will by the use or  
 38 threatened use of immediate force, violence or fear of  
 39 injury to that person." RCW 9A.56.190. "Such force or  
 40 fear must be used to obtain or retain possession of the  
 41 property, or to prevent or overcome resistance to the

1 taking." *Id.* Any force or threat, even slight, is  
 2 sufficient to sustain a robbery conviction. *State v.*  
*3 Handburgh*, 119 Wn.2d 284, 293 (1992).

4 Although Mr. O'Connell contends he was entitled to  
 5 instruct the jury on first degree theft, the record does  
 6 not support the factual prong of this lesser included  
 7 offense. His victim testified that Mr. O'Connell  
 8 threatened to rape and kill her, fought with her, pushed  
 9 her out of her car, and then hit her arm when he backed up  
 10 the car. Even if the defense had been successful in  
 11 discrediting her testimony, an officer testified that she  
 12 had obvious injuries. Because the record shows both use  
 13 and threatened use of violence, first degree theft is not  
 14 a justified lesser included offense. Trial counsel's  
 15 failure to propose such an instruction was a legitimate  
 16 trial strategy and was not prejudicial. *State v. King*, 24  
*17 Wn.App 495, 498-99 (1979).*

18 Finally Mr. O'Connell contends trial counsel should  
 19 have proposed an instruction on reckless driving as a  
 20 lesser included offense of attempt to elude a police  
 21 vehicle. Former RCW 46.61.024 (1983), the attempt to  
 22 elude statute, states that "[a]ny driver of a motor  
 23 vehicle who wilfully fails or refuses to immediately bring  
 24 his vehicle to a stop and who drives his vehicle in a  
 25 manner indicating a wanton or wilful disregard for the  
 26 lives or property of others while attempting to elude a  
 27 pursuing police vehicle, after being given a visual or  
 28 audible signal to bring the vehicle to a stop, shall be  
 guilty of a class C felony." Reckless driving, a  
 misdemeanor, involves driving a vehicle in "willful or  
 wanton disregard for the safety of persons or property."  
 RCW 46.61.500(1). Both statutes require a willful or  
 wanton disregard for the safety of others. Thus, it is  
 impossible to violate the eluding statute without  
 violating the reckless driving statute, and reckless  
 driving is a lesser included offense of eluding. See  
*State v. Parker*, 102 Wn.2d 161, 164-65 (1984)(discussing  
 former RCW 46.61.024 (1979)).

29 Additional mental elements for attempt to elude,  
 30 however, are willful failure to stop and attempting to  
 31 elude a pursuing police vehicle. RCW 46.61.024; *Parker*,  
 32 102 Wn.2d at 165. Mr. O'Connell offered no evidence at  
 33 trial to rebut the State's evidence that he began speeding  
 34 when the marked police car that first followed him turned  
 35 on its lights. Eventually, more than one police vehicle  
 36 pursued him. An officer testified that Mr. O'Connell  
 37 reached speeds of 70 to 80 miles per hour as he swerved  
 38 around corners and drove west on Sprague Avenue toward  
 39 downtown Spokane. Considering the strength of this  
 40 unrebutted evidence for refusal to stop, the record does  
 41 not support the factual prong for a lesser included  
 42 offense instruction on reckless driving. *Stevens*, 158

1 Wn.2d at 310. Accordingly, defense counsel's failure to  
2 propose such an instruction was neither unreasonable nor  
prejudicial. *Davis*, 152 Wn.2d at 673.

3 (Exhibit 3 at 14-17.) (Parallel citations omitted.)

4           In his argument that he was entitled to lesser included  
5 instructions, Petitioner mistakenly relies on *Beck v. Alabama*, 447  
6 U.S. 625 (1980). Although it is clearly established federal law  
7 that a defendant is entitled to an instruction on a lesser-included  
8 offense in a capital case, *Hopper v. Evans*, 456 U.S. 605, 611  
9 (1982); *Beck*, 447 U.S. at 628, it is not "clearly established"  
10 Supreme Court law that due process requires giving a lesser included  
11 instruction in non-capital cases. *Solis v. Garcia*, 219 F.3d 922,  
12 929 (9<sup>th</sup> Cir. 2000). Petitioner's case is a non-capital case. Under  
13 Ninth Circuit law, the failure to instruct on lesser-included  
14 offenses in a non-capital case does not present a federal  
15 constitutional question. *Windham v. Merkle*, 163 F.3d 1092, 1106 (9<sup>th</sup>  
16 Cir. 1998). Therefore, Petitioner is not entitled to habeas relief  
17 for his ineffective assistance of counsel claims based on failure to  
18 request jury instructions on lesser included offenses.<sup>3</sup>

1 Accordingly, **IT IS RECOMMENDED**, habeas relief based on counsel's  
 2 failure to request lesser included offense jury instructions be  
 3 **DENIED**.

4 **B. Factual Predicate Three - Voluntary Intoxication Instruction**

5 Petitioner next contends his counsel's request for a voluntary  
 6 intoxication jury instruction was prejudicial error that confused  
 7 the jury and affected the outcome of the trial. He asserts there  
 8 was no factual basis for the instruction, and it conflicted with his  
 9 defense theory of diminished capacity. (Ct. Rec. 2 at 11-20.)

10 The appellate court rejected this argument, reasoning as  
 11 follows:

12 Defense counsel argued that Mr. O'Connell was either  
 13 intoxicated on the night of the incident or was  
 14 incapacitated due to long-term drug abuse. Mr. O'Connell  
 15 now contends this defense was confusing and the jury could  
 16 have thrown out the diminished capacity defense if it did  
 17 not believe he was intoxicated. The record simply does  
 18 not indicate that these two aspects of the defense based  
 19 on lack of intent were difficult to separate.

20 Voluntary intoxication is a subset of the general  
 21 defense of diminished capacity. *State v. Eakins*, 127  
 22 Wn.2d 490, 498 (1995). The defense is effective when the  
 23 defendant can show that the crime charged has as an  
 24 element a particular mental state, that he or she had been  
 25 drinking or consuming drugs, and that the consumption  
 26 affected his ability to acquire the required mental state.  
*State v. Gabryschat*, 83 Wn.App. 249, 252 (1996). To show  
 27 diminished capacity, the defendant must produce expert  
 28 testimony demonstrating he or she suffered from a mental  
 condition that impaired his or her ability to form the  
 requisite specific intent. *State v. Turner*, 143 Wn.2d  
 715, 730 (2001); *Eakins*, 127 Wn.2d at 502. As noted by

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29 includes unrebutted evidence of the infliction of bodily harm in the  
 30 commission of theft, a refusal to stop when so instructed by the  
 31 police, and driving in a manner indicating wanton and willful  
 32 disregard for the lives of others while attempting to elude police.  
 33 *Hopper*, 456 U.S. at 611-12.

1 the State, the jury could have rejected the diminished  
 2 capacity defense due to the lack of a mental condition,  
 3 yet could have accepted the witnesses' testimony that Mr.  
 4 O'Connell was intoxicated at the time of the incident.  
 Defense counsel discussed both theories in closing  
 argument, and the jury addressed separate instructions on  
 the defenses. Mr. O'Connell shows neither an unreasonable  
 defense strategy nor prejudice.

5

6 (Exhibit 3 at 13-14.)

7 To challenge a jury instruction on habeas, the defendant must  
 8 prove "'the ailing instruction by itself so infected the entire  
 9 trial that the resulting conviction violates due process.'" *Estelle*  
 10 *v. McGuire*, 502 U.S. 62, 72 (quoting *Cupp v. Naughten*, 414 U.S. 141,  
 11 147 (1973)). The instruction must be viewed in the context of the  
 12 entire trial and the jury instructions taken as a whole. *Id.*; see  
 13 also *Strickland*, 466 U.S. at 685 (counsel error must result in  
 14 unfair trial to violate due process).

15 Here, the appellate court found that under state law, voluntary  
 16 intoxication is a subset of the diminished capacity defense.  
 17 (Exhibit 3 at 13.) This court has no authority to review a state  
 18 court's application of its own laws. *Jackson v. Ylst*, 921 F.2d 882,  
 19 885 (9<sup>th</sup> Cir. 1990). The appellate court determined the instruction  
 20 was reasonable and correct in defining the two aspects of the  
 21 defense: mental condition and voluntary intoxication. The jury was  
 22 instructed that evidence of intoxication "may be considered in  
 23 determining whether the defendant acted with the intent to commit  
 24 the crimes [charged]." (Exhibit 15 at 191.) It was not an  
 25 unreasonable strategy for defense counsel to propose two possible  
 26 bases for lack of intent. Under the instructions given by the trial  
 27 court, Petitioner was able to argue fully that he did not have the  
 28 requisite mental state to commit either crime. The instruction as

1 given did not create fundamental unfairness by denying Petitioner an  
2 opportunity to present his theory of the case to the jury. Because  
3 there is no showing of a due process violation, the claim is not  
4 cognizable on federal habeas review. *See Beardslee v. Woodford*, 358  
5 F.3d 560, 578 (9<sup>th</sup> Cir. 2004), cert. denied, 543 U.S. 842 (2004);  
6 *Solis v. Garcia*, 219 F.3d 922, 927 (9<sup>th</sup> Cir. 2000), cert. denied, 534  
7 U.S. 839 (2001); *Bashor v. Risley*, 730 F.2d 1228, 1240 (9<sup>th</sup> Cir.  
8 1984), cert. denied, 469 U.S. 838 (1984) (habeas relief unavailable  
9 unless contested jury instruction, viewed in context of entire  
10 trial, denied due process).

11 Petitioner's argument that there is no factual basis for the  
12 voluntary intoxication jury instruction is without merit. The  
13 victim testified Petitioner used crack cocaine and was acting  
14 unusually agitated and demanding money the night of the crime.  
15 (Exhibit 15 at 53.) The witness who helped the victim immediately  
16 after the crime, testified the victim stated her assailant was on  
17 crack that night. (*Id.* at 101.) Petitioner's medical expert  
18 testified that Petitioner reported he was using methamphetamine,  
19 crack and alcohol at the time of the crime. (*Id.* at 114.) Evidence  
20 submitted by Petitioner with his PRP also shows Petitioner was  
21 intoxicated the night of the crime. (Exhibit 8, Appendix C,  
22 *Affidavit of Elmer O'Connell, Sr.*) The appellate court reasonably  
23 found there was sufficient evidence favorable to the State to  
24 establish beyond a reasonable doubt the essential elements of first  
25 degree robbery and attempting to elude a police vehicle, including  
26 intent. *See Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (habeas  
27 relief unavailable if, viewing the record in light most favorable to  
28 the State, any rational trier of fact could have found the essential

1 elements of the crimes charged). Further, Petitioner's argument  
 2 that the instruction could have confused the jury is speculation.  
 3 There is no evidence in the record to indicate the instruction on  
 4 voluntary intoxication was erroneous. There is no evidence in the  
 5 record that creates an inference of jury confusion. *Beardslee*, 358  
 6 F.3d at 575. Petitioner has not shown "'a reasonable likelihood  
 7 that the jury . . . applied the challenged instruction in a way'  
 8 that violated the Constitution." *Solis*, 219 F.3d at 927 (quoting  
 9 *Estelle*, 502 U.S. at 72).

10 Because there was evidence of intoxication, as found by the  
 11 state court, and no evidence that the jury misapplied the  
 12 instruction, Petitioner failed to establish prejudice resulting from  
 13 the voluntary intoxication instruction. Further, it was reasonable  
 14 for counsel to argue two bases for diminished capacity. The  
 15 appellate court reasonably found no prejudice was shown; therefore,  
 16 there is no constitutional violation. *Strickland*, 466 U.S. at 697.  
 17 **IT IS RECOMMENDED** habeas relief based on counsel's request for a  
 18 voluntary intoxication instruction be **DENIED**.

19 **C. Factual Predicate Four - Failure to Interview and Call  
 20 Witnesses**

21 Petitioner next claims trial counsel did not sufficiently  
 22 interview defense witnesses or call them during trial. He claims  
 23 his counsel should have presented testimony from three people who  
 24 would have provided evidence to support his defense theory. (Ct.  
 25 Rec. 2 at 20.)

26 The appellate court considered affidavits submitted by  
 27 Petitioner's family and friends in support of Petitioner's PRP claim  
 28 that defense counsel did not conduct a reasonable investigation.

1 (Exhibit 3 at 12-13; Exhibit 8, Appendices A-F; Ct. Rec. 15,  
 2 Exhibits A, B, C.) The appellate court stated:

3 Mr. O'Connell admitted that he had taken his  
 4 acquaintance's car, but claimed that he lacked the intent  
 5 to rob her or to elude police because of diminished  
 6 capacity and/or voluntary intoxication. The affidavits he  
 7 presents are from family members and friends who allege  
 8 that trial counsel would not return their calls and that  
 9 they wanted to testify that Mr. O'Connell was a nice man  
 10 who would not hurt or steal from anyone. His father  
 11 declared that Mr. O'Connell was intoxicated on the night  
 12 of the incident, a defense Mr. O'Connell is now rejecting.  
 13 Considering the reasonable defense of incapacity chosen by  
 14 trial counsel, the testimony of these witnesses would not  
 15 have been necessary or particularly helpful. Even if  
 16 these prospective witnesses could have described the state  
 17 of Mr. O'Connell's mind at the time of the incident, their  
 18 testimony would have been redundant. Both defense and  
 19 State witnesses testified that Mr. O'Connell appeared  
 20 agitated, spent long periods of time in the bathroom, and  
 21 had a history of drug abuse. Further, if the family  
 22 members and friends testified as to his good character,  
 23 the prosecutor could have cross-examined them regarding  
 24 their knowledge of his extensive criminal history. *State*  
 25 *v. Lord*, 117 Wn.2d 829, 891-92 (1991). Mr. O'Connell  
 fails to show that trial counsel's investigation was  
 inadequate or that it prejudiced his defense.

16 (Exhibit 3 at 12-13.)

17 It is well established "counsel has a duty to make reasonable  
 18 investigations or to make a reasonable decision that makes  
 19 particular investigations unnecessary." *Strickland*, 466 U.S. at  
 20 691. Although "[j]udicial scrutiny of counsel's performance must be  
 21 highly deferential," *id.* at 689, "we have found counsel to be  
 22 ineffective where he neither conducted a reasonable investigation  
 23 nor made a showing of strategic reasons for failing to do so,"  
 24 *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9<sup>th</sup> Cir. 1994). "[A] lawyer  
 25 who fails adequately to investigate, and to introduce into evidence,  
 26 [evidence] that demonstrate[s] his client's factual innocence, or  
 27 that raise[s] sufficient doubt as to that question to undermine  
 28 confidence in the verdict, renders deficient performance." *Hart v.*

1 *Gomez*, 174 F.3d 1067, 1070 (9<sup>th</sup> Cir. 1999), cert. denied, 528 U.S.  
2 929 (1999) (finding defense counsel's performance deficient because  
3 he failed to review or introduce at trial documents corroborating  
4 defense witness's testimony); see also *Lord v. Wood*, 184 F.3d 1083,  
5 1096 (9<sup>th</sup> Cir. 1999), cert. denied, 528 U.S. 1198 (2000) (finding  
6 defense counsel's performance deficient because he failed to  
7 interview or call at trial three witnesses who had told police and  
8 investigators that they saw the victim alive a day after the  
9 defendant allegedly killed her); *Sanders*, 21 F.3d at 1457 (finding  
10 defense counsel's performance deficient because he failed to  
11 investigate or introduce at trial evidence implicating his client's  
12 brother).

13 As discussed by the appellate court, the submitted affidavits  
14 do not contain factual evidence that was not brought out at trial.  
15 On the contrary, the submitted statements confirmed that Petitioner  
16 was looking for money for more drugs, was intoxicated, and was  
17 behaving in an aggressive manner, to the point his family was  
18 telling him to get out or let them take him to the hospital.  
19 (Exhibit 15, *Affidavits*.) The affidavit of Elmer O'Connell, Sr.,  
20 confirms that he spoke to trial counsel about the events of that  
21 evening. As found by the appellate court, it was reasonable for  
22 counsel to avoid putting family and friends on the stand to testify  
23 about Petitioner's character, as this would allow cross-examination  
24 by the prosecutor into Petitioner's past criminal history. (Exhibit  
25 3 at 12-13.) Evidence from Petitioner's family that would support  
26 either a diminished capacity or intoxication defense was  
27 unnecessary, as evidenced by the psychologist's testimony, and other  
28 witness testimony that Petitioner was intoxicated the night of the

1 crime, as well jury instructions on both topics. (Exhibit 15 at  
 2 191.) Petitioner failed to show trial counsel's investigation and  
 3 witness selection was unreasonable or caused prejudice. Thus, **IT IS**  
 4 **RECOMMENDED** habeas relief based on this claim **BE DENIED**.

5 As to all factual grounds involving Petitioner's ineffective  
 6 assistance of counsel claim, the state court decision was neither  
 7 contrary to nor an unreasonable application of clearly established  
 8 law. Accordingly, **IT IS RECOMMENDED** habeas relief on the  
 9 ineffective assistance of counsel claim be **DENIED**.

10 **CLAIM TWO: CUMULATIVE ERROR**

11 Petitioner asserts he is entitled to habeas relief based on  
 12 cumulative error. (Ct. Rec. 2 at 32.) Petitioner asserts all of  
 13 the claims asserted in his habeas petition constitute sufficient  
 14 cumulative error to warrant habeas relief.

15 "Although no single alleged error may warrant habeas corpus  
 16 relief, the cumulative effect of errors may deprive a petitioner of  
 17 the due process right to a fair trial." *Jackson v. Brown*, 513 F.3d  
 18 1057, 1085 (9<sup>th</sup> Cir. 2008); *Karis v. Calderon*, 283 F.3d 1117, 1132  
 19 (9<sup>th</sup> Cir. 2002); see also *Whelchel v. Washington*, 232 F.3d 1197, 1212  
 20 (9<sup>th</sup> Cir. 2000) (noting cumulative error applies on habeas review);  
 21 *Matlock v. Rose*, 731 F.2d 1236, 1244 (6<sup>th</sup> Cir. 1984), cert. denied,  
 22 470 U.S. 1050 (1989) ("[e]rrors that might not be so prejudicial as  
 23 to amount to a deprivation of due process when considered alone, may  
 24 cumulatively produce a trial setting that is fundamentally unfair").  
 25 Such is not the case here. Petitioner has not shown prejudicial  
 26 error which would warrant the application of the doctrine. The  
 27 record does not reflect that Petitioner was deprived of a fair trial  
 28 by the claimed errors. Accordingly, **IT IS RECOMMENDED** this claim be

1 **DISMISSED WITH PREJUDICE.**

2 Having addressed all of Petitioner's claims, **IT IS RECOMMENDED**  
3 Respondent's Motion to Dismiss with prejudice be **GRANTED**.

4 **OBJECTIONS**

5 Any party may object to a magistrate judge's proposed findings,  
6 recommendations or report within ten (10) days following service  
7 with a copy thereof. Such party shall file written objections with  
8 the Clerk of the Court and serve objections on all parties,  
9 specifically identifying the portions to which objection is being  
10 made, and the basis therefor. Any response to the objection shall  
11 be filed within ten (10) days after receipt of the objection.  
12 Attention is directed to FED. R. CIV. P. 6(d), which adds additional  
13 time after certain kinds of service.

14 A district judge will make a de novo determination of those  
15 portions to which objection is made and may accept, reject, or  
16 modify the magistrate judge's determination. The judge need not  
17 conduct a new hearing or hear arguments and may consider the  
18 magistrate judge's record and make an independent determination  
19 thereon. The judge may, but is not required to, accept or consider  
20 additional evidence, or may recommit the matter to the magistrate  
21 judge with instructions. *United States v. Howell*, 231 F.3d 615, 621  
22 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P. 72;  
23 LMR 4, Local Rules for the Eastern District of Washington.

24 A magistrate judge's recommendation cannot be appealed to a  
25 court of appeals; only the district judge's order or judgment can be  
26 appealed.

27 The District Court Executive is directed to file this Report  
28 and Recommendation and provide copies to Petitioner, counsel for

1 Defendant and the referring district judge.

2 DATED February 3, 2009.

3  
4 S/ CYNTHIA IMBROGNO  
5 UNITED STATES MAGISTRATE JUDGE  
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